

1 Stuart G. Gross (#251019)  
2 sgross@grosskleinlaw.com  
3 GROSS & KLEIN LLP  
4 The Embarcadero, Pier 9, Suite 100  
5 San Francisco, CA 94111  
6 (415) 671-4628

7 Of counsel:

8 David S. Godkin (admitted *pro hac vice*)  
9 James E. Kruzer (admitted *pro hac vice*)  
10 BIRNBAUM & GODKIN, LLP  
11 280 Summer Street  
12 Boston, MA 02210  
13 (617) 307-6100  
14 godkin@birnbaumgodkin.com  
15 kruzer@birnbaumgodkin.com

16 Attorneys for Plaintiff,  
17 SIX4THREE, LLC, a Delaware  
18 limited liability company

19 SUPERIOR COURT OF CALIFORNIA

20 COUNTY OF SAN MATEO

21 SIX4THREE, LLC, a Delaware limited  
22 liability company;

23 Plaintiff,

24 v.

25 FACEBOOK, INC., a Delaware  
corporation;  
MARK ZUCKERBERG, an individual;  
CHRISTOPHER COX, an individual;  
JAVIER OLIVAN, an individual;  
SAMUEL LESSIN, an individual;  
MICHAEL VERNAL, an individual;  
ILYA SUKHAR, an individual; and  
DOES 1 through 50, inclusive,

Defendants.

Case No. CIV 533328

Assigned for all purposes to  
Hon. V. Raymond Swope, Dept.  
23

OPPOSITION TO FACEBOOK INC'S  
EX PARTE APPLICATION FOR AN  
ORDER SHORTENING TIME FOR  
DEPOSITIONS

Date: April 12, 2019

Time:

Filing Date: April 10, 2015

Trial Date: April 25, 2019

1315  
CIV533328  
MPAO  
Memorandum of Points and Authorities in Oppo  
1765093



1                   Counsel of record for Six4Three submits this brief response to Facebook's *Ex Parte* Application  
2 for an Order Shortening Time for Depositions.

3                   First, as the Court is aware, on April 10, 2019, counsel of record for Six4Three filed a Petition  
4 for Peremptory Writ of Mandate, Prohibition or Other Appropriate Relief, and Request for Immediate  
5 Stay, in the Court of Appeal of the State of California, First Appellate District. The petition seeks an  
6 immediate stay of discovery in this action, specifically any orders of this Court that require counsel of  
7 record to perform legal services on behalf of Six4Three, while their motions to be relieved as counsel  
8 for Six4Three are under submission.

9                   Facebook's *ex parte* application constitutes a further example of the harm caused by the delay in  
10 ruling on counsels' motions to be relieved as counsel, thereby forcing conflicted counsel to take action  
11 on Six4Three's behalf to avoid prejudicing Six4Three's rights. Accordingly, we respectfully request  
12 that the Court take no action on Facebook's *ex parte* application until the Court of Appeals makes a  
13 determination on counsels' petition for an immediate stay. Six4Three is entitled to representation by  
14 unconflicted counsel in connection with this matter, and current counsel of record should not be forced  
15 to provide representation that is prohibited by the rules of professional responsibility. The undersigned  
16 are filing this opposition solely in order to preserve Six4Three's rights.

17                   Second, the undersigned notes for the Court that the relief requested by Facebook in its  
18 application with respect to searches to be performed by the forensic examiner risks violating the attorney-  
19 client and work product privileges, and potentially other privileges. Facebook requests an order requiring  
20 the forensic examiner to perform searches of Mr. Kramer's and Mr. Scaramellino's computers using a  
21 proposed list of third-party e-mail domains. Insofar as Mr. Kramer and Mr. Scaramellino have not had  
22 possession of their computers for months, these proposed searches will not reveal any recent  
23 communications that Facebook cites as the basis for its application.

24                   Furthermore, however, it is conceivable the searches proposed by Facebook will yield documents  
25 protected by privilege. For example, a search for documents using the third-party email "guardian"  
26 might yield a privileged communication (attorney-client and/or work product) between Six4Three and  
27 counsel about a communication with the Guardian newspaper. Accordingly, if the Court is inclined to  
28 grant Facebook's application, its order should provide that before any documents are provided to counsel

1 for Facebook, Six4Three should be given a sufficient opportunity to conduct a privilege review of any  
2 documents responsive to the search terms so that any privileged documents can be segregated and  
3 logged. Any disputes regarding such documents can be resolved by the Court if necessary. Such a  
4 process is required to prevent waiver of privilege (including the work product privilege, which is not  
5 waived by the crime-fraud exception to the attorney-client privilege.)

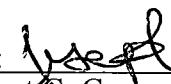
6 For the foregoing reasons, the undersigned counsel respectfully request that the Court defer  
7 decision on Facebook's application while their request for an immediate stay of discovery is pending by  
8 the Court of Appeals. Alternatively, if the Court is inclined to grant Facebook's application and order  
9 the forensic examiner to perform searches, Six4Three should be given a sufficient opportunity to review  
10 any resulting documents before they are produced to Facebook so that any privileged documents can be  
11 logged.

12 Dated: April 12, 2019

Respectfully Submitted,

13 GROSS & KLEIN LLP

14 BIRNBAUM & GODKIN, LLP

15 By:  for Mr. Godkin  
16 Stuart C. Gross, Esq.  
17 David S. Godkin (admitted *pro hac vice*)  
James E. Kruzer (admitted *pro hac vice*)

18 Attorneys for Plaintiff Six4Three, LLC

19  
20  
21  
22  
23  
24  
25  
26  
27  
28

## **CERTIFICATE OF SERVICE**

I, Jennifer Cuellar, declare:

I am a citizen of the United States, am over the age of eighteen years, and am not a party to or interested in the within entitled cause. My business address is 88 Kearny Street, 10th Floor, San Francisco, California 94108.

On April 12, 2019, I served the following document(s) on the parties in the within action:

**OPPOSITION TO FACEBOOK INC'S EX PARTE APPLICATION FOR AN ORDER  
SHORTENING TIME FOR DEPOSITIONS**

**VIA HAND:** The above-described document(s) will be placed in a sealed envelope which will be hand-delivered on this same date by \_\_\_\_\_, addressed as listed below.

Superior Court of California County of San Mateo  
Department 23  
400 County Center  
Redwood City, CA 94063

X **VIA E-MAIL:** I attached the above-described document(s) to an e-mail message, and invoked the send command at approximately \_\_\_\_ AM/PM to transmit the e-mail message to the person(s) at the e-mail address(es) listed below. My email address is jcuellar@mpbf.com

Computer Law Group, LLP  
401 Florence Street  
Palo Alto, CA 94301  
Email: [jrusso@computerlaw.com](mailto:jrusso@computerlaw.com)  
[csargent@computerlaw.com](mailto:csargent@computerlaw.com)

Attorneys for Theodore Kramer and Thomas Scaramellino

Theodore Kramer  
Email: Theodore.kramer@protonmail.com

Attorneys for Theodore Kramer and Thomas Scaramellino

Donald P. Sullivan  
WILSON ELSER  
525 Market Street, 17<sup>th</sup> Floor  
San Francisco, CA 94105  
Donald.sullivan@wilsonelser.com

Attorneys for Gross & Klein LLP

Steven J. Bolotin  
MORRISON MAHONEY LLP  
250 Summer Street  
Boston, MA 02210  
[sbolotin@morrisonmahoney.com](mailto:sbolotin@morrisonmahoney.com)

Attorney for Birnbaum & Godkin LLP

1 Joshua H. Lerner - jlerner@durietangri.com  
2 Sonal N. Mehta - SMEhta@durietangri.com  
3 Laura Miller - LMILLER@durietangri.com  
4 Catherine Kim - ckim@durietangri.com  
5 Durie Tangri  
6 217 Leidesdorff Street  
7 San Francisco, CA 94111  
8 Email: SERVICE-SIX4THREE@durietangri.com

9  
10 Attorneys for Facebook, Inc.  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

1 I declare under penalty of perjury under the laws of the State of California that the foregoing is  
2 a true and correct statement and that this Certificate was executed on April 12, 2019.

3  
4 By \_\_\_\_\_  
5 Jennifer Cuelar  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28